FILED
NOV 18 1936
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

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**No. 155**

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EMPLOYERS REINSURANCE CORPORATION

*Petitioner,*

*versus*

RANDOLPH BRYANT, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS

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# SUPPLEMENTAL BRIEF OF PETITIONER

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# INDEX.

## SUBJECT INDEX.


| | Page |
|---|---|
| Opinion of Court Below | 1. |
| Jurisdiction | 1, 3 |
| Statutes involved | 3 |
| Statement of case | 3- 6 |
| Specification of errors | 6, 7 |
| Argument | 7-30 |
| Summary of Argument | 7- 9 |
| First Point: Where the requisite diversity of citizenship and jurisdictional amount are present and proper proceedings have been had for the removal of the cause to the Federal Court, the federal jurisdiction attaches and for want of general jurisdiction such as jurisdiction over the person of a necessary party, it is error for and transcends the jurisdiction of, the District Court of the United States to which the case has been removed, to remand the case to the State court and it should dismiss the cause if it cannot proceed to judgment by reason of such failure of general jurisdiction | 7 |
| Second Point: Section 28 of the Judicial Code, as amended (Sec. 71, Title 28 U. S. C. A.), providing that no appeal or writ of error shall be allowed from a decision remanding a cause involving decision that the case was improperly removed, does not preclude action, of which this Honorable Court has jurisdiction, requiring the District Court of the United States to exercise such jurisdiction as it has when it remands the case without making a decision that the cause was improperly removed | 8 |
| Third Point: Where it is admitted that a case has been properly removed from a State to the Federal Court and that the latter court has jurisdiction of the subject matter of the litigation, the action of the judge of the District Court of the United States in remanding the case to the State court under the provisions of Section 37 of the Judicial Code (Sec. 80, Title 28 U. S. C. A.), in order that service of process may be made upon the defendant below, does not involve the exercise of judicial discretion and is beyond the jurisdiction of the court | 8 |
| Fourth Point: Where it is admitted that a case has been properly removed from the State to the Federal Court and that the latter court has jurisdiction of the subject matter of the litigation, but may not proceed to judgment because of lack of service upon the defendant, and therefore remands the case to the State court in order that service of process | |

upon the defendant may be obtained, writ of mandamus or writ of prohibition may issue to correct the error of the judge of the Federal Court in so remanding the case in excess of the jurisdiction of said court ..... 8

Fifth Point: Because of hardship alone, the legal jurisdiction of a court of the United States may not be abdicated by the court itself ..... 9

## TABLE OF CASES CITED.

Cases:

Adair v. Employers Reinsurance Corporation, 10 F. Sup. 725 ..... 28, 29
Bogart v. Southern Pacific Company, 228 U. S. 137 ..... 9, 12, 13, 14
Cady v. Associated Colonies, 19 Fed. 420 ..... 28, 29
Chicago & Alton Railroad Company v. Wiswall, 23 Wall. 507 ..... 21, 22
Cohen v. Virginia, 6 Wheat. 264 ..... 28
Ex Parte Harding, 219 U. S. 363 ..... 3, 21, 24
Ex Parte Nebraska, 209 U. S. 436 ..... 21, 25
Ex Parte Park Square Automobile Station, 244 U. S. 412 ..... 21, 25
Ex Parte Parker, 120 U. S. 737 ..... 3
Ex Parte Roe, 234 U. S. 70 ..... 21, 25
Gay v. Ruff, 292 U. S. 25 ..... 3, 21, 24
Goldey v. Morning News, 156 U. S. 518 ..... 9, 16
Hyde v. Stone, 20 How. 170 ..... 28
In Re Pennsylvania Company, 137 U. S. 451-52-53 ..... 21, 22
Knickbocker Insurance Company v. Comstock, 16 Wall. 258 ..... 21, 22
Lawrence v. Southern Pacific Company, 180 U. S. 822 ..... 9, 12, 13, 14, 15, 16, 17, 28, 29
Lawton v. Blitch, 20 Fed. 641 ..... 9, 18, 19, 28, 29
McClellan v. Carland, 217 U. S. 268 ..... 3, 21, 24, 28
Postal Telegraph-Cable Company v. Call, 244 Fed. 850 ..... 21, 26
Re Chicago M. & St. P. & P. Railroad Company, 50 F. (2d) 430 ..... 28, 29
Re Pollitz, 206 U. S. 323 ..... 21, 25
Re Winn, 213 U. S. 458 ..... 3, 21, 24
Travelers Protective Association of America v. Smith et al, 71 F. (2d) 511 ..... 22, 23
United States Mortgage & Trust Company v. Dever, 44 F. (2d) 913 22, 26
Virginia v. Paul, 148 U. S. 107 ..... 3, 22, 24
Virginia v. Rives, 100 U. S. 313 ..... 3, 22, 24, 25
Wabash Railway Company v. Woodrough, 29 F. (2d) 832 ..... 22

## TABLE OF STATUTES CITED

Statutes:


Circuit Court of Appeals Act 1891, Amended ..... 2
Judicial Code, Section 28 ..... 7, 8, 9, 20, 22, 23, 24
Judicial Code, Section 29 ..... 2, 9, 10, 15, 17
Judicial Code, Section 37 ..... 7, 8, 9, 11, 13, 15, 20, 22, 23
Judicial Code, Section 38 ..... 2, 9, 10, 15, 17
Judicial Code, Section 240, amended ..... 2
Judicial Code, Section 262 ..... 2
Revised statutes of U. S., Section 716 ..... 2
Statutes at Large, Vol. 26, pages 826, 828 ..... 2
U. S. C. A. Title 28, Section 71 ..... 7, 8, 9, 20, 22, 24
U. S. C. A. Title 28, Section 72 ..... 2, 9, 10, 15, 17
U. S. C. A. Title 28, Section 80 ..... 7, 8, 9, 11, 20, 22, 23
U. S. C. A. Title 28, Section 81 ..... 2, 9, 10, 15, 17
U. S. C. A. Title 28, Section 347 ..... 2
U. S. C. A. Title 28, Section 377 ..... 2
U. S. Comp. Stats. 1901, page 580 ..... 2

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## I.

**Opinion of the Court Below:**

The opinion in the United States Circuit Court of Appeals for the Fifth Circuit (R. 16-19) is reported in 82 F. (2d) 373.

## II.

**Jurisdiction:**

1. The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was entered March 11, 1936 (R. 16), and became final April 3rd, 1936 (R. 21), upon entry of order denying petition for rehearing.

2. The petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and Brief in support thereof were filed in the office of the clerk of this

Honorable Court on the 2nd day of July, 1936 as will appear from the records of said office.

3. The jurisdiction of this Court is invoked under the Circuit Court of Appeals Act of 1891, amended (March 3, 1891, Chapter 517, Section 6; 26 Stats. at L. 826, 828; Title 28 U. S. C. A. Section 347; Judicial Code, Section 240, amended) and under the provisions of Section 716 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901; page 580; Title 28 U. S. C. A., Section 377; Judicial Code, Section 262).

4. The reasons relied on for the granting of the writ together with the references to the transcript and conflict of authorities have already been stated in the petition for writ of certiorari under paragraph II (pages 5-7), and are hereby adopted and made part of this brief. It may be stated in addition that it is earnestly urged by petitioner that when the cause below styled *W. J. Clark v. Employers Reinsurance Corporation*, No. 3352 At Law, in the District Court of the United States for the Eastern District of Texas, was properly removed to that court (which is conceded, R. 2-4, 15, 18) the jurisdiction of the State Court absolutely terminated and that of the District Court of the United States attached since that court had jurisdiction of the subject matter (R. 8) and general jurisdiction of the case (R. 18) and that thereafter under the applicable provisions of Sections 29 and 38 of the Judicial Code (Secs. 72 and 81, Title 28 U. S. C. A.) the cause must be treated as though originally filed in the Federal Court and that its action in remanding the case to the State court was *coram non judice*, to correct which writ of mandamus or writ of prohibition may issue. It is submitted that these matters present important questions of Federal law and procedure which have not been, but should be passed upon by this court, and that

there is great need for an authoritative and elucidating decision thereon.

5. The cases believed to sustain the jurisdiction of this court are as follows:

*McClellan* v. *Carland*, 217 U. S. 268, 54 L. Ed. 762, 30 Sup. Ct. 501;

*Gay* v. *Ruff*, 292 U. S. 25, 78 L. Ed. 1099;
*Ex Parte Parker*, 120 U. S. 737, 30 L. Ed. 818;
*Re Winn*, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873;
*Virginia* v. *Rives*, 100 U. S. 313, 25 L. Ed. 667;
*Virginia* v. *Paul*, 148 U. S. 107, 37 L. Ed. 386, 13 Sup. Ct. 536 and
*Ex Parte Harding*, 219 U. S. 363, 55 L. Ed. 252, 31 Sup. Ct. 34.

## III.

### Statutes Involved:

The statutes involved are fully set forth and the material portions thereof quoted in the brief heretofore filed in this honorable court in support of the petition for writ of certiorari in Section III, pages 9 to 11 thereof, to which reference is here made and which are hereby adopted and made a part of this brief.

## IV.

### Statement of the Case:

The decision and judgment of the United States Circuit Court of Appeals for the Fifth Circuit in effect refused to review or revise an order of the Honorable Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas, entered in cause No. 3352 at Law, styled W. J. Clark v. Employers Reinsurance Corporation pending in said Court, remanding said cause, admittedly prop-

erly removed to the District Court of the United States for the Eastern District of Texas, to the District Court for the 124th Judicial District of Texas, Gregg County, Texas, in order that service of process might be obtained upon the defendant below, petitioner herein. The cause last referred to was originally filed by W. J. Clark, plaintiff below, against petitioner Employers Reinsurance Corporation in the said District Court for the 124th Judicial District of Texas, seeking recovery against petitioner upon a policy of Workmen's Compensation Insurance alleged to have been issued by petitioner to the employer, Shell Petroleum Corporation (R. 1-2). Thereafter, petitioner duly and timely filed its petition and bond for removal of said cause to the District Court of the United States for the Eastern District of Texas, and same was duly removed to and filed upon the law docket of said Court, No. 3352 at Law (R. 2, 15). Petitioner, appearing specially only, thereupon filed its plea to the jurisdiction of said District Court of the United States for the Eastern District of Texas, reciting that petitioner was not properly before the Court, having never been served with due and proper service, and moved to quash the citation theretofore issued out of the District Court for the 124th Judicial District of Texas and the return thereon showing service thereof upon one John R. Young, on the ground that said Young was not, at the time of the filing of said suit or the issuance of said citation or the service thereof, an agent of petitioner (R. 12-13). Thereafter, without waiting for the ruling of the Honorable Judge of the District Court of the United States for the Eastern District of Texas, the plaintiff, W. J. Clark, caused to be issued out of said court, citation directed to one E. C. Gaines, which was served upon said Gaines by the United States Marshal for the Western District of Texas, at Austin, in said District (R. 13-14). Thereupon, again appearing specially only, petitioner renewed

in said District Court of the United States for the Eastern District of Texas, its plea to the jurisdiction of said court on the ground that it had not been served in said cause by due and proper service, and moved to quash the citation and service thereon issued out of said court, on the ground that said suit was a cause not of a local nature, and that service of citation was had and made without the territorial boundaries of the Eastern District of Texas, and was therefore of no force or effect (R. 10-11). Upon due consideration the Honorable Judge of the District Court of the United States for the Eastern District of Texas, sustained the motions to quash (R. 9). Thereupon the plaintiff below, admitting the jurisdiction of the Federal court over the subject matter of the litigation (R. 8), filed his motion to remand said cause to the State court, showing as his sole ground therefor that he was unable to obtain service upon the defendant within the Eastern District of Texas, and that, therefore, the jurisdiction of the Federal court was doubtful (R. 8-9). Petitioner, appearing specially only, thereupon in support of its plea to the jurisdiction, filed its opposition to the motion to remand (R. 7-8), but the Honorable Judge of the District Court of the United States for the Eastern District of Texas granted the motion to remand on January 20, 1936 (R. 6-7).

Petitioner sought and obtained (R. 15) leave of the United States Circuit Court of Appeals for the Fifth Circuit to file a petition reciting substantially the foregoing proceedings and orders, praying for the issuance of a writ of mandamus directed to the Honorable Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas, and to said court, directing said judge and said court, and each of them, to vacate and set aside the order of said court remanding to the state court the cause above re-

ferred to, and praying for the issuance of a writ of prohibition prohibiting and enjoining the said judge of the District Court of the United States for the Eastern District of Texas and the said court, from remanding said cause to the State court (R. 1-6) and filed therewith exhibits supporting the allegations of said petition (R. 6-14). A show cause order was duly issued and in answer thereto the Honorable Judge of the District Court of the United States for the Eastern District of Texas, while admitting as substantially true the account of the record and proceedings had in cause No. 3352 upon the law docket of said court, as set forth in said petition, stated that he was of the opinion that his action in remanding said cause to the State court was authorized under 28 U. S. C. A. Sec. 80 (Sec. 37 Judicial Code) (R. 15-16). The decree and opinion of the United States Circuit Court of Appeals for the Fifth Circuit, denying the relief prayed for, was handed down on March 11, 1936 (R. 16-19), and thereafter, on March 30, 1936 (R. 19-20) petitioner duly and timely filed its petition for rehearing, which was on the 3rd day of April, 1936, denied (R. 21).

## V.

### Specification of Errors:

The United States Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that the action of the Honorable Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas, and said court, involving no decision upon any issue or question of fact, in remanding a cause, admittedly properly removed to the said court, to the State Court in order that service of process could be made upon a necessary party, was an exercise either of judicial discretion or *proper* judicial discretion.

2. In holding that the prohibition against allowance of appeal or writ of error from an order, involving no decision upon any issue or question of fact, remanding a cause, admittedly properly removed to the Federal Court, to a State court as said prohibition is set forth in Section 28 of the Judicial Code (Sec. 71, Title 28 U. S. C. A.), should be read into Section 37 of the Judicial Code (Sec. 80, Title 28 U. S. C. A.) so that writ of mandamus or writ of prohibition may not issue to revise or correct said order.

3. In failing to hold that the action which involved no decision upon any issue or question of fact, of the Honorable Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas, and said court, in ordering the remand of a case admittedly properly removed to the Federal Court, to a State court for trial, transcended and exceeded the jurisdiction and authority of said judge and said court and constituted an abdication of the authority and jurisdiction thereof to correct which writ of mandamus and writ of prohibition may issue.

## VI.

## ARGUMENT.

### Summary of the Argument:

### First Point:

Where the requisite diversity of citizenship and jurisdictional amount are present and proper proceedings have been had for the removal of the cause to the Federal Court, the federal jurisdiction attaches and for want of general jurisdiction such as jurisdiction over the person of a necessary party, it is error for and transcends the jurisdiction of, the District Court of the United States to which the case has been

removed, to remand the case to the State court and it should dismiss the cause if it can not proceed to judgment by reason of such failure of general jurisdiction.

**Second Point:**

Section 28 of the Judicial Code, as amended (Sec. 71, Title 28 U. S. C. A.), providing that no appeal or writ of error shall be allowed from a decision remanding a cause involving decision that the case was improperly removed, does not preclude action, of which this Honorable Court has jurisdiction, requiring the District Court of the United States to exercise such jurisdiction as it has, when it remands the case without making a decision that the cause was improperly removed.

**Third Point:**

Where it is admitted that a case has been properly removed from a State to the Federal Court and that the latter court has jurisdiction of the subject matter of the litigation, the action of the judge of the District Court of the United States in remanding the case to the State court under the provisions of Section 37 of the Judicial Code, (Sec. 80, Title 28 U. S. C. A.), in order that service of process may be made upon the defendant below, does not involve the exercise of judicial discretion and is beyond the jurisdiction of the court.

**Fourth Point:**

Where it is admitted that a case has been properly removed from the State to the Federal Court and that the latter court has jurisdiction of the subject matter of the litigation, but may not proceed to judgment because of lack of service upon the defendant, and therefore remands the case to the State court in order that service of process upon the defendant may be obtained, writ of mandamus or writ of prohibition may is-

sue to correct the error of the judge of the Federal Court in so remanding the case in excess of the jurisdiction of said court.

**Fifth Point:**

Because of hardship alone, the legal jurisdiction of a court of the United States may not be abdicated by the court itself.

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## STATEMENT, ARGUMENT AND AUTHORITIES UNDER PETITIONER'S FIRST POINT.

*Statement in Support of First Point:*

It is the contention of petitioner herein that where the requisite diversity of citizenship and jurisdictional amount is present and proper proceedings have been had for the removal of the cause from the state to the District Court of the United States, the jurisdiction of said court as a federal court and jurisdiction attaches and thereafter under the provisions of Sections 29 and 38 of the Judicial Code (Sections 72 and 81, Title 28 U. S. C. A.) the District Court of the United States should proceed therein as if the suit had been originally commenced in said District Court of the United States and it may not thereafter remand the case to the state court.

*Authorities in Support of First Point:*

*Bogart* v. *Southern Pacific Company*, 228 U. S. 137, 57 L. Ed. 768;

*Goldey* v. *Morning News*, 156 U. S. 518, 39 L. Ed. 517;
*Lawrence* v. *Southern Pacific Company*, 180 Fed. 822;
*Lawton* v. *Blitch*, 30 Fed. 641;

Section 28 Judicial Code (Sec. 71, Title 28 U. S. C. A.)
Section 29 Judicial Code (Sec. 72, Title 28 U. S. C. A.)
Section 37 Judicial Code (Sec. 80, Title 28 U. S. C. A.)
Section 38 Judicial Code (Sec. 81, Title 28 U. S. C. A.)

*Argument in Support of First Point:*

In addition to the provisions of the laws of the United States providing for the removal of causes to the courts of the United States by reason of diversity of citizenship it is provided in part by Section 29 of the Judicial Code (Sec. 72, Title 28 U. S. C. A.) that when so removed "the cause shall then proceed in the same manner as if it had been originally commenced in the said district court." It is also provided in Section 38 of the Judicial Code (Sec. 81, Title 28 U. S. C. A.) as follows:

> "The district court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said State court prior to its removal."

Petitioner earnestly believes that no true and full understanding of the situation now before the court may be arrived at until the effect of the above quoted sections of the Judicial Code in relation to one another and to the existing fact situation, is given consideration. It is apparent that since the plaintiff below procured the issuance of process out of the District Court of the United States for the Eastern District of Texas and attempted to have same served (R. 13-14), it was never contended that said cause was improperly removed to said court or that the jurisdiction of said court as a Federal court did not attach. It is apparent also from an examination of the motion to remand (R. 8-9) and the order granting same (R. 6-7), which is based solely on the motion, that the sole ground for granting the motion to remand was that the court was unable to proceed to judgment because valid service of process could not be made upon the petitioner within the Eastern District of Texas. Petitioner

apprehends therefore that if authority is to be found supporting the order granting the motion to remand, such must be found, if at all, within the meaning of the phraseology of Section 37 of the Judicial Code (Sec. 80, Title 28 U. S. C. A.) which reads as follows:

> "If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

What is the meaning of the word "jurisdiction" as used in Section 37 of the Judicial Code just above quoted? The word "jurisdiction", of course, may refer to many things and be subject to various interpretations. It is admitted by the plaintiff below for example in the motion to remand (R. 8-9), that the Honorable District Court of the United States for the Eastern District of Texas has jurisdiction of the subject matter of the litigation therein. This then is evidently not the jurisdiction to which the plaintiff below refers when he claims that the jurisdiction of the Honorable District Court of the United States for the Eastern District of Texas has so far failed that the cause should be remanded. It follows that the lack of jurisdiction upon which the plaintiff below relied for a remand of the case must be lack of jurisdiction of the Honor-

able District Court of the United States for the Eastern District of Texas over the person of the defendant. At this point the word "jurisdiction" appears to divide itself readily into two different categories; jurisdiction of the District Court of the United States per se, such as the existence of a federal question, diversity of citizenship, jurisdictional amount, etc.; and general jurisdiction, such for example, as that over the person or property of the litigants. The first is naturally peculiar to the Federal courts alone; the second is common to all courts. It is to an examination of the absence or presence of these two categories of jurisdiction that this brief is directed.

The petitioner is prepared to admit that for failure of jurisdiction in the sense of the first category above referred to, such as failure of jurisdictional amount in controversy, diversity of citizenship, etc., a case may be remanded to the state court. But no such case is here presented.

After an exhaustive examination of the authorities, petitioner has been able to find only a few cases dealing directly with this subject. Most of the cases deal with the failure of the jurisdiction of the court in the sense of the first category above referred to. The cases most directly in point are connected cases, styled respectively, *Lawrence* v. *Southern Pacific Company*, 180 Fed. 822, and *Bogart* v. *Southern Pacific Company*, 228 U. S. 137, 57 L. Ed. 768. The latter case is an appeal to this Honorable Court from an order of the Circuit Court (now the District Court) for the Eastern District of New York dismissing for want of an indispensable party the bill in a suit which had been removed from a State court to that court. The suit was originally brought in the State court by Walter B. Lawrence against certain individuals, including, among others, the Houston & Texas Central Railway Company. Upon

petition of certain of the defendants, the case was removed to the Circuit Court of the United States. After removal these same defendants filed a plea to the jurisdiction in which it was set out that the Houston & Texas Central Railway Company was a necessary and indispensable party to the suit; that it was beyond the jurisdiction of the court and could not be brought in by process, and that, therefore, the bill should be dismissed. A motion was then made by the plaintiff to remand the case on the ground that the circuit court could not obtain jurisdiction over the Houston & Texas Central Railway Company but that the State court from which it was removed could acquire jurisdiction over the parties. This motion was overruled and upon hearing, the plea to the jurisdiction was sustained and the cause dismissed, the opinion of the lower court appearing, as already stated, in 180 Fed. 822, under the style of *Lawrence* v. *Southern Pacific Company*. This Honorable Court refused to review the decision of the lower court, but in so doing makes clear the distinction between the two categories of jurisdiction sought here to be emphasized by the petitioner.

It is the contention of the petitioner that the term "jurisdiction" as used in Section 37 of the Judicial Code for lack of which a Federal Court may remand, is jurisdiction in the sense of the first category above referred to and not the general jurisdiction "applicable as well to the State as to Federal tribunals." In discussing the action taken by the lower court the opinion by the Supreme Court says:

> "What the court really did in the present case was, first, to ascertain jurisdiction of the suit upon the removal; and then applying the general principle that a suit cannot be proceeded with in the absence of an indispensable party, to dismiss it because the railway company was an indis-

pensable party to the present suit, and had not been served, and had not appeared or waived service, as would have been the requirement in any court of equity reaching the same conclusion.

". . . . . as therein embraced the decision was that the cause should be dismissed for want of jurisdiction, and not that it should be remanded to the State court. This decision was to the effect that the court, having reached the conclusion in the exercise of jurisdiction, that an indispensable party was not upon the record, ordered a dismissal of the action. This did not involve a decision of the jurisdiction of the court as a Federal tribunal."

Thus it is made clear that the Bogart case, supra, presents a question involving jurisdiction in the sense of the second category above, a question of jurisdiction not peculiar to the Federal Courts, but common to all courts. It is submitted that just such a case is here presented. The decision of the Supreme Court in the Bogart case seems to say then that upon removal to a Federal Court, the court entertains jurisdiction in the sense of the first category. If it finds this lacking, it may dismiss or remand as justice may require, but if this be present yet jurisdiction in the sense of the second category be found wanting and the court may not, therefore, proceed to judgment, it will dismiss the cause.

While in its decision this Honorable Court failed to pass directly on the point, still the reasoning of the court is so similar to that advanced in the opinion of the lower court that petitioner cannot but feel that the Supreme Court must have approved it. The opinion of the lower court above referred to, is, however, even more illuminating on these points. It is made plain therein that the motion to remand was made upon the same section of the Judicial Code hereinabove referred to. The court in a rather extended opinion passes directly upon the

point and points out the similarity of the facts in that case to those in the present instance by saying:

> "It is similar to a motion to dismiss by a defendant who has appeared specially and removed the cause, upon the ground that the service of the parties has not been of such nature as to allow the action to be maintained in the Circuit Court under the provisions of Section 3 of the Act." (Sec. 72, Title 28 U. S. C. A.).

It is noted that under this section of the Act (Sec. 29 Judicial Code; Section 72, Title 28 U. S. C. A.) and also Section 38 of the Judicial Code (Section 81, Title 28 U. S. C. A.) above quoted, it is provided that after removal, the cause shall then proceed in the same manner as if it had been originally commenced in the District Court of the United States.

In its opinion in the Lawrence case, supra, the lower court then proceeds to discuss the clause "but shall dismiss the suit or remand it to the court from which it was removed, as justice may require," as set forth in Section 37 of the Judicial Code, saying:

> "It may be noted here that in some cases the sentence just quoted has been interpreted to mean that, if the court does not appear to have jurisdiction, the suit should be dismissed, if begun in the Circuit Court, but that it shall be remanded if removal has been had. See *Northern Pac. Ter. Co.* v. *Lowenburg*, 18 Fed. 339. But the words in the alternative, followed by the phrase 'as justice may require', which have been quoted above do not indicate that this sentence was intended to be applied in the respective consecutive way just indicated, but, on the contrary, when either of the conditions arise, the proper alternative remedy should be applied for that condition."

In other words when it has been made to appear (1) that such suit does not really and substantially involve a dispute or

controversy properly within the jurisdiction of said District Court (by this petitioner understands the Congress to mean the jurisdiction of the court as a Federal Court), or (2) that the parties to said suit have been improperly made or collusively joined, then the court shall in the alternative dismiss or remand as justice may require but that when it shall appear that the suit has been properly removed and the court has jurisdiction of the subject matter but that the case cannot proceed to judgment because the service was not such as to enable the court to render a judgment against the defendant, the cause can only be dismissed. *Goldey* v. *Morning News*, 156 U. S. 518, 39 L. Ed. 517. It is submitted that in this case the plaintiff below has not only failed to show that the Federal Court has not jurisdiction, but has affirmatively admitted that it does have jurisdiction of the subject matter (jurisdiction in the sense of the first category) (R. 8) and, of course, no question of parties improperly or collusively made can appear in this case. This is a case in which the court may not proceed to judgment solely because of a defect of service. The case is not one of lack of jurisdiction of the court, but one of how the court should exercise such jurisdiction as it has.

In its opinion in the case of *Lawrence* v. *Southern Pac. Company*, supra, the court says:

> ". . . . . the precise objection is that the case cannot proceed to judgment through the lack of an indispensable party, and that the objection on that ground must be considered exactly as if the action had been instituted in the Circuit Court of the United States originally, and upon the trial plaintiff had been confronted with an objection to proceeding in the absence of this indispensable defendant.
>
> ". . . . . The provision that after removal, the removed case shall proceed as if originally begun in the

> United States Court means that from that time on the rights of the parties provided the case can be considered by the court are to be interpreted according to their actual positions when tested by the standards of the laws of the United States with reference to their claims for relief."

Considering, therefore, that the present case has been properly removed to the Honorable District Court of the United States for the Eastern District of Texas (R. 18); that a diversity of citizenship and the jurisdictional amount in controversy exist and giving effect to the above quoted portions of Sections 38 and 29 of the Judicial Code (Secs. 81 and 72, Title 28 U. S. C. A.) and so treating the cause as though originally brought in the District Court of the United States, does it not follow without question that for failure to obtain jurisdiction over the person of the defendant, the cause may not be remanded but should be dismissed?

On this point the opinion of the lower court in the Lawrence case, supra, proceeds:

> "Such cases as have been cited establish the proposition that if jurisdiction exists over the subject matter of the action, but if there is a defect in jurisdiction over the parties, that question of jurisdiction should be determined as if action had been begun in the United States Circuit Court in the first instance; and the conclusion must be necessarily that for this court to send the present action (which is between citizens of different states, which has been properly removed into this district, and which could be determined as between the parties before the court, if no one else were necessary to such determination and hence in which there is no defect of jurisdiction, but simply lack of parties) to a state court for trial and thereby to hold that such a suit does not properly belong within the jurisdiction of this court, or that there has

been improper or collusive joinder of parties, is impossible, and it must be held that the defendants interposing pleas are entitled to judgment dismissing the action, if the absent party be not brought in within a reasonable time."

Following this line of reasoning, there are a number of decisions which hold that upon a remand of a case to the State court, the case proceeds as though it had never been removed. This is because it is said that the State court never lost jurisdiction, the Federal Court remanding the case having held that the federal jurisdiction (jurisdiction in the sense of the first category above) never attached. But note the difference in the present case. It is admitted by the parties hereto that the Federal Court has jurisdiction of the subject matter of the litigation (R. 8), and by this petitioner understands that it is admitted that the jurisdiction in the sense of the first category has attached. But the Federal Court cannot proceed to judgment because it has no jurisdiction over the person of the defendant below. What is the effect of the attaching of this jurisdiction of the United States Court as a Federal Court, jurisdiction in the sense of the first category above? Petitioner believes it is too well established to require the citation of authorities that upon the attaching of the jurisdiction of the Federal Court the jurisdiction of the State court has been extinguished. Having been extinguished, can the Federal Court bring it again to life? It is thought not. If this were so, why could not the Federal Court transfer cases originally filed before it to a State court? Indeed it has been held that after the jurisdiction of the Federal Court has attached upon a removal proceeding, the parties cannot by consent cause a remand to the State court. *Lawton* v. *Blitch*, 30 Fed. 641. In that case the court says with respect

to entering the order of remand under such circumstances:

> "I do not think this court has the authority to make the order. When a case is properly removed to this jurisdiction, under the Act of March 3, 1875, the jurisdiction of the State court is finally determined. It ceases to exist. Further proceedings by it would be coram non judice. . . . The jurisdiction of the State court is extinguished by the removal of the cause, if it be properly removed. The jurisdiction then is in this court as if it had been commenced here and this court cannot give it status anew in the State court, without express authority of law so to do, and there is no such warrant in the Act of Congress. This court would have as much right to transfer to the State court any other case of which it had jurisdiction by consent of parties. The consent of parties cannot empower the court to do that which it has no jurisdiction to do, with relation to this or any other application. The case may be dismissed here and commenced anew in the State court, but to remand it is quite another proceeding."

For the reasons stated above, petitioner says that the Honorable District Court of the United States for the Eastern District of Texas was without authority to enter the order granting the motion to remand in the case below and that said order granting the motion to remand, being beyond the jurisdiction of said court, is void and of no force or effect.

## STATEMENT, ARGUMENT AND AUTHORITIES UNDER PETITIONER'S SECOND, THIRD AND FOURTH POINTS.

### Second Point:

Section 28 of the Judicial Code as amended (Section 71, Title 28 U. S. C. A.), providing that no appeal or writ of error should be allowed from a decision remanding a cause involving decision that the case was improperly removed, does not preclude action, of which this Honorable Court has jurisdiction, requiring the District Court of the United States to exercise such jurisdiction as it has, when it remands the case without making a decision that the cause was improperly removed.

### Third Point:

Where it is admitted that a case has been properly removed from a State to the Federal Court and that the latter court has jurisdiction of the subject matter of the litigation, the action of the judge of the District Court of the United States in remanding the case to the State court under the provisions of Section 37 of the Judicial Code (Sec. 80, Title 28 U. S. C. A.), in order that service of process may be made upon the defendant below, does not involve the exercise of judicial discretion and is beyond the jurisdiction of the court.

### Fourth Point:

Where it is admitted that a case has been properly removed from the State to the Federal Court and that the latter court has jurisdiction of the subject matter of the litigation, but may not proceed to judgment because of lack of service upon the defendant, and therefore remands the case to the State court in order that service of process upon the defendant may be obtained, writ of mandamus or writ of prohibition may

issue to correct the error of the judge of the Federal Court in so remanding the case in excess of the jurisdiction of the court.

*Statement in Support of Second, Third and Fourth Points:*

The petitioner's second, third and fourth points present questions so closely allied that they are grouped and will be discussed together.

*Authorities in Support of Second, Third and Fourth Points:*

*Chicago & Alton Railroad Co.* v. *Wiswall, 23* Wall. 507, 23 L. Ed. 103;

*Ex Parte Harding,* 219 U. S. 363, 55 L. Ed. 252, 31 Sup. Ct. 324;

*Ex Parte Nebraska,* 209 U. S. 436, 52 L. Ed. 876;

*Ex Parte Park Square Automobile Station,* 244 U. S. 412, 61 L. Ed. 1231; 37 Sup. Ct. 732;

*Ex Parte Roe,* 234 U. S. 70; 58 L. Ed. 1217, 34 Sup. Ct. 722;

*Gay* v. *Ruff,* 292 U. S. 25; 78 L. Ed. 1099;

*In Re Pennsylvania Company,* 137 U. S. 451-452-453, 11 Sup. Ct. 141, 34 L. Ed. 738;

*Knickerbocker Insurance Co.* v. *Comstock,* 16 Wall. 258, 21 L. Ed. 493;

*McClellan* v. *Carland,* 217 U. S. 268, 54 L. Ed. 762, 30 Sup. Ct. 501;

*Postal Telegraph-Cable Co.* v. *Call,* 255 Fed. 850;

*Re Pollitz,* 206 U. S. 323, 51 L. Ed. 1081;

*Re Winn,* 213 U. S. 458, 53 L. Ed. 873, 29 Sup. Ct. 515;

Section 28 Judicial Code (Sec. 71, Title 28 U. S. C. A.);

Section 37 Judicial Code (Sec. 80, Title 28 U. S. C. A.);

*Travelers Protective Association of America* v. *Smith et al*, 71 F. (2d) 511;

*United States Mortgage & Trust Co.* v. *Dever*, 44 F. (2d) 913;

*Virginia* v. *Rives*, 100 U. S. 313, 25 L. Ed. 667;

*Virginia* v. *Paul*, 148 U. S. 107, 37 L. Ed. 386, 13 Sup. Ct. 536;

*Wabash Railway Co.* v. *Woodrough*, 29 F. (2d) 832.

*Argument in Support of Second, Third and Fourth Points.*

It is well settled, that in the absence of statutes, mandamus is an appropriate remedy to require the trial court to hear and decide a case which it has improperly remanded. *Chicago & Alton Railroad Company* v. *Wiswall*, 23 Wall. 507, 23 L. Ed. 103; *Knickerbocker Insurance Company* v. *Comstock*, 16 Wall. 258, 21 L. Ed. 493; *In Re Pennsylvania Company*, 137 U. S. 451-452-453, 11 Sup. Ct. 141, 34 L. Ed. 738 and *Wabash Railway Company* v. *Woodrough*, 29 F. (2d) 832.

The pertinent portion of Section 28 of the Judicial Code as amended (Section 71, Title 28 U. S. C. A.) is as follows:

> "Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed."

It seems clear that the effect of this statute is to forbid appellate review of an order remanding a case when "the district court shall decide that the cause was improperly removed." No such case is presented here. Here it clearly appears that the order remanding the case was made not because the court decided that the cause had been improperly removed but because the court below could not proceed to judgment in the case. (R. 15-16). An examination of the phraseology of Section 37 of the Judicial Code (Sec. 80, Title 28 U. S. C. A.) under which it appears the court below must have purported to act in granting the motion to remand, reveals no language similar to that portion of Section 28 of the Judicial Code just above quoted. Petitioner has found no case upon the point other than that of *Traveler [illegible]ctive Association of America* v. *Smith et al*, 71 F. (2d) 511, decided by the Circuit Court of Appeals for the Fourth Circuit in 1934, the opinion being by Circuit Judge Parker. As already pointed out, all of the cases which have been examined by counsel for petitioner except those herein cited, appear to be based upon a failure of federal jurisdiction as such, i. e., jurisdiction in the sense of the first category above referred to. Judge Parker seems to have had the same experience for in his opinion in the latter case, he says:

> "We have examined carefully the authorities which hold that, because of the provisions of Section 28 of the Judicial Code, mandamus no longer lies to require a district court to hear and determine a case which has been remanded. The language of some of the cases is very broad, but they must be interpreted in connection with the facts under review, and in all of them there was expressed or implied finding of improper removal. In none of the cases which we have been able to find has it been held that the effect of the statute is to deprive the appellate court of the power to require the trial court to

hear and decide a case which has been properly removed and which has been remanded solely on the ground of action taken subsequent to the removal which did not affect jurisdiction.

". . . . . We do not think that it was the intention of Congress that a party entitled to invoke the federal jurisdiction should be without remedy if the court, without a finding expressed or implied of improper removal, should remand the case to a state court on a ground arising after removal and not affecting jurisdiction. Certainly we do not find in the statutes any evidence of such intention."

In fact, despite the prohibition against allowance of appeal or writ of error from an order remanding a case to a state court, contained in Section 28 of the Judicial Code (Sec. 71, Title 28 U. S. C. A.) this Honorable Court has held that it may by certiorari review the action of a circuit court of appeals in ordering a remand of a case. *Gay* v. *Ruff*, 292 U. S. 25, 78 L. Ed. 1099. Similarly this court has held that it may on writ of certiorari to a circuit court of appeals review the denial of an original petition for mandamus to compel a judge of a district court of the United States to proceed with and determine an action pending in that court. *McClellan* v. *Carland*, 217 U. S. 268, 54 L. Ed. 762, 30 Sup. Ct. 501.

Petitioner urges that the order of the court below remanding the case to the State Court was an act beyond the jurisdiction of the court and so coram non judice. Petitioner submits that the undisputed facts surrounding this application bring it within the line of decisions represented by *Virginia* v. *Rives*, 100 U. S. 313, 25 L. Ed. 873, 29 Sup. Ct. 515, and *Virginia* v. *Paul*, 148 U. S. 107, 37 L. Ed. 386, 13 Sup. Ct. 536, and succeeding cases, fully discussed in the case of *Ex Parte Harding*, 219 U. S. 363, 55 L. Ed. 252, 31 Sup. Ct. 324, without however in

any way abrogating the principles laid down by the former line of decisions or their application to the present situation. The present instance apparently represents the reverse of the situations in *Ex Parte Roe*, 234 U. S. 70, 58 L. Ed. 1217, 34 Sup. Ct. 722, and *Ex Parte Park Square Automobile Station*, 244 U. S. 412, 61 L. Ed. 1231, 37 Sup. Ct. 732, and justifies recourse to the extraordinary remedies authorized under the decisions in the former line of cases since the writs prayed for afford petitioner its only available remedy.

While it is admitted that where removability of a case turns upon whether there was a separable controversy, or any other exercise of judicial discretion, except when that discretion has been abused, the writ does not lie, *Re Pollitz*, 206 U. S. 223, 51 L. Ed. 1081; *Ex Parte Nebraska*, 209 U. S. 436, 52 L. Ed. 876, it is noted that in each of these cases a distinction was made between it and a case where on the face of the record absolutely no jurisdiction has attached. So too it is thought that writ of mandamus or writ of prohibition may issue when the action complained of is outside of the exercise of this discretion and outside the jurisdiction of the Court or officer to which or to whom the writ is addressed. Petitioner believes that this same distinction may logically be drawn where as here jurisdiction of the subject matter admittedly and on the face of the record has attached (R. 8) and the court has exercised such jurisdiction by issuing its process (R. 13-14), and thereafter quashing such process, the service thereof and return thereon (R. 9), but thereafter seeks to abdicate such jurisdiction by the entry of an order beyond its authority. One of the peculiar and more common uses of the writ of mandamus is to restrain inferior courts and to keep them within their lawful bounds. *Virginia* v. *Rives, supra.* The Honorable Circuit Court of Appeals for the Fifth Circuit appears to

have followed this doctrine in its decision pronounced in the cases of *Postal Telegraph-Cable Company* v. *Call*, 255 Fed. 850 and in *United States Mortgage & Trust Company* v. *Dever*, 44 F. (2d) 913. In the latter case, the opinion by Judge Walker states as follows:

> "By the above mentioned order the District Court halted the exercise of its jurisdiction to await action of another court which could not affect the right of the District Court to exercise its jurisdiction. That order had the effect of a failure or refusal of the District Court to decide a pending case which had been submitted to it for decision. No sufficient reason appearing for the failure of the District Court to proceed to final judgment in order that this court may exercise the jurisdiction of review given by law, a writ of mandamus is appropriate to compel the District Court to determine the question submitted to it for decision by the motion to dismiss."

Petitioner earnestly urges that upon the face of the record here, the action of the court below in ordering the remand involved no exercise of judicial discretion. Here the facts are admitted. The jurisdiction of the court is admitted except in so far as its inability to bring the defendant below, petitioner here, before it. In this case the court, "has halted the exercise of its jurisdiction to await action of another court which could not affect the right of the district court to exercise" such jurisdiction as it had. Boiled down to its essentials, the question appears to be whether or not the court below is empowered to abdicate its jurisdiction in order to aid the plaintiff below to repair the result of his, and not the petitioner's error, in failing to obtain proper service upon the defendant below at the proper time, by remanding the case to the State court for service, though it is admitted that the cause was properly removed to the federal court (R. 18) and

that that court acquired jurisdiction of the subject matter. (R. 8). In view of the language used by the Honorable Circuit Court of Appeals for the Fifth Circuit in its opinion below (R. 18), the petitioner cannot refrain from saying that it is not in any manner responsible for the position in which the plaintiff below placed himself. The petitioner just as firmly believes that in justice it should not be sued at all. But this is not the question before the court. It is the position of the petitioner that since it is admitted that the cause was properly removed to the Federal Court (R. 2-4, 15, 18) and that that court acquired jurisdiction of the subject matter (R. 8) no question was left for decision by the Honorable Judge of the District Court of the United States for the Eastern District of Texas involving the exercise of judicial discretion.

Since the Federal jurisdiction as such has admittedly attached in the court below and such appears from the record, the court below had no authority to remand the case and in attempting so to do the court has so far stepped beyond the bounds of its jurisdiction that its action is void. Petitioner adds that unless the writ of mandamus or writ of prohibition prayed for herein issues there remains no method by which litigants may exercise the absolute right to have their cases tried in the Federal courts, even where all of the conditions prescribed by the statutes as necessary to give jurisdiction have been met and, as we see it, the effect of a ruling denying the relief prayed for herein will be to deprive litigants of all opportunity to resort to the Federal Courts, except as the judges of the District Courts of the United States may permit them to do so.

## STATEMENT, ARGUMENT AND AUTHORITIES UNDER PETITIONER'S FIFTH POINT.

**Fifth Point:**

Because of hardship alone, the legal jurisdiction of a court of the United States may not be abrogated by the court itself.

*Statement in Support of Fifth Point:*

Petitioner can add nothing to the statement of Fifth Point as set forth in the quoted proposition itself, the matter being more fully treated hereinafter.

*Authorities in Support of Fifth Point:*

*Adair* v. *Employers Reinsurance Corporation*, 10 F. Sup. 725;

*Cady* v. *Associated Colonies*, 119 Fed. 420 at page 423;

*Cohen* v. *Virginia*, 6 Wheat. 264, 5 L. Ed. 257;

*Hyde* v. *Stone*, 20 How. 170, 15 L. Ed. 874;

*Lawrence* v. *Southern Pac. Co.*, 180 Fed. 822;

*Lawton* v. *Blitch*, 30 Fed. 641;

*McClellan* v. *Carland*, 217 U. S. 268, 54 L. Ed. 762;

*Re Chicago, M. & St. P. & P. R. Co.*, 50 F. (2d) 430.

*Argument in Support of Fifth Point:*

It has long been well recognized that a Federal court cannot abdicate its authority or duty in favor of another jurisdiction. *Cohen* v. *Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Hyde* v. *Stone*, 20 How. 170, 15 L. Ed. 874; *McClellan* v. *Carland*, 217 U. S.

268, 54 L. Ed. 762. And this is true even though suggested by the parties, *Cady* v. *Associated Colonies*, 119 Fed. 420 at page 423, or agreed upon by them. *Lawton* v. *Blitch*, 30 Fed. 641.

As was said by Judge Sanborn in *Re Chicago, M. & St. P. & P. R. Co.*, 50 Fed. (2d) 430:

> "Having jurisdiction of this proceeding, this court is bound to retain it. It is without power to remand the case. Even if the question of remand is doubtful, it is the duty of the court to deny the motion to remand."

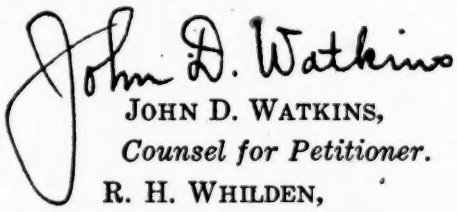
If the jurisdiction of the court is to be changed that may not be done by the court but must be done by the law making power. *Adair* v. *Employers Reinsurance Corporation*, 10 F. Sup. 725 at page 726. The petitioner earnestly urges that the Honorable Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas had no jurisdiction or power to deny the rightful jurisdiction of his court. It is sincerely believed as stated in the case of *Lawrence* v. *Southern Pacific Company*, 180 Fed. 822, that "The theory that the words 'as justice may require' gave the court the power to choose the forum for litigants and dispense with rights created by statutes for motives of interest or sympathy with the litigant whose cause of action may be nullified because no court can apply a remedy is . . . . beyond the jurisdiction of a Circuit Court of the United States."

In closing, the petitioner wishes to add that it does not now, nor has it ever questioned the motives of the Honorable Randolph Bryant, District Judge of the United States District Court for the Eastern District of Texas, for whom in both

his personal and judicial capacity the petitioner and its counsel have the greatest respect.

Petitioner again respectfully requests that the writs of mandamus and of prohibition issue as prayed for.

Respectfully submitted,



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p. 2.

# SUPREME COURT OF THE UNITED STATES.

No. 155.—October Term, 1936.

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| Employers Reinsurance Corporation, Petitioner, *vs.* Randolph Bryant, United States District Judge for the Eastern District of Texas. | On Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. |

[January 4, 1937.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This case involves an effort to obtain by mandamus and prohibition a reexamination and vacation of an order of a federal district court remanding to a state court a suit theretofore removed into the former from the latter.

A citizen of Texas sued a corporate citizen of Missouri in a state court of Gregg County, Texas, to recover a sum in excess of three thousand dollars, exclusive of interest and costs, upon a policy of workmen's compensation insurance, and caused process to be issued out of that court and served upon an alleged agent of the defendant. Without otherwise appearing in the state court, the defendant in due time and mode caused the suit to be removed, by reason of the diverse citizenship of the parties, into the federal court for the eastern district of Texas, which includes Gregg County.

After the removal the defendant, appearing specially, showed that the alleged agent upon whom process had been served prior to the removal was not in fact its agent, and the federal court set aside the service. At the plaintiff's instance further process was issued out of that court and served upon an agent of the defendant within the western—not eastern—district of Texas. Again appearing specially, the defendant challenged this service because made outside the court's territorial jurisdiction, and the service was set aside.

Obtaining the removal from the state court into the federal court did not operate as a general appearance by the defendant,[1] and, as the service of process against it proved invalid and it declined to appear voluntarily, the federal court plainly was without personal jurisdiction of the defendant, although in other respects having jurisdiction of the suit.

The defendant had been admitted to do, and was doing, business in Texas, had an agent within the western district upon whom process could be served in that district, but had no agent within the eastern district where the suit was pending.

The suit was *in personam* and not within any exceptional provision empowering the federal court to send its process outside its district. Therefore that court's process could be effectively served only within the district.[2] But the state court was not subject to such a limitation and could send its process to any part of the State.

In these circumstances the plaintiff moved that the suit be remanded to the state court because the federal court was without, and unable to obtain, personal jurisdiction of the defendant; and in support of the motion the plaintiff asserted that the defendant had not been effectively served with process, had not voluntarily appeared and had no agent within the district upon whom process could be served. Coming to act upon this motion, the federal court construed § 80, Title 28, U. S. Code, as authorizing it either to dismiss the suit or to remand the same to the state court, as justice might require; concluded that justice required a remanding order because "an order of dismissal would prevent the plaintiff from refiling [beginning anew] his suit within the time permitted by the statutes of Texas and would amount to a complete denial of his right to litigate his claim"; and accordingly entered an order remanding the suit to the state court.

The defendant, conceiving that the remanding order was wrongly made, petitioned the circuit court of appeals for writs of mandamus and prohibition commanding the judge of the district court to vacate that order and prohibiting him from giving any effect to it. The court of appeals entertained the petition, ordered the judge to

[1] Wabash Western Ry. Co. *v.* Brow, 164 U. S. 271; Mechanical Appliance Co. *v.* Castleman, 215 U. S. 437; Cain *v.* Commercial Publishing Co., 232 U. S. 124; General Investment Co. *v.* Lake Shore Ry. Co., 260 U. S. 261.

[2] Toland *v.* Sprague, 12 Pet. 300, 328-330; Insurance Co. *v.* Bangs, 103 U. S. 435, 439-440; Munter *v.* Weil Corset Co., 261 U. S. 276, 279; Robertson *v.* Labor Board, 268 U. S. 619, 622-623.

show cause why the requested writs should not issue, received and considered his return disclosing the proceedings and matters already recited, and denied the petition. 82 F. (2d) 373. The case is here on certiorari.

We are of opinion the petition was rightly denied, first, because the remanding order was not subject to appellate reexamination on petition for mandamus or otherwise, and, secondly, because even if open to reexamination on petition for mandamus, the order was made in the exercise of lawful authority and was appropriate to the situation in which it was made.

1. For a long period an order of a federal court remanding a cause to the state court whence it had been removed could not be reexamined on writ of error or appeal, because not a final judgment or decree in the sense of the controlling statute.[3] But in occasional instances such an order was reexamined in effect on petition for mandamus, and this on the theory that the order, if erroneous, amounted to a wrongful refusal to proceed with the cause and that in the absence of other adequate remedy mandamus was appropriate to compel the inferior court to exercise its authority.[4]

By the Act of March 3, 1875, c. 137, 18 Stat. 472, dealing with the jurisdiction of the circuit (now district) courts, Congress provided, in § 5, that if a circuit court should be satisfied at any time during the pendency of a suit brought therein, or removed thereto from a state court, that "such suit does not really or substantially involve a dispute or controversy within" its "jurisdiction", the court should proceed no further therein, but should "dismiss the suit or remand it to the court from which it was removed, as justice may require".[5] Thus far this section did little more than to make mandatory a practice theretofore largely followed, but sometimes neglected, in the circuit courts.[6] But the section also contained a concluding paragraph, wholly new, providing that the order "dismissing or remanding the said cause to the state court" should be reviewable on writ of error or appeal. This provision for an appellate review continued in force until it was expressly repealed

[3] Railroad Co. *v.* Wiswall, 23 Wall. 507.
[4] Railroad Co. *v.* Wiswall, *supra.*
[5] This provision is still in force as part of § 80, Title 28, U. S. Code.
[6] Dillon Removal of Causes, 3d ed., § 82; Conkling's Treatise, 5th ed., p. 170; Pollard *v.* Dwight, 4 Cranch 421, 428-429.

by the Act of March 3, 1887, c. 373, § 6, 24 Stat. 552,[7] which also provided that an order remanding a cause to a state court should be "immediately carried into execution" and "no appeal or writ of error" from the order should be allowed.[8]

The question soon arose whether the provisions just noticed in the Act of March 3, 1887, should be taken broadly as excluding remanding orders from all appellate review, regardless of how invoked, or only as forbidding their review on writ of error or appeal. The question was considered and answered by this Court in several cases, the uniform ruling being that the provisions should be construed and applied broadly as prohibiting appellate reexamination of such an order, where made by a circuit (now district) court, regardless of the mode in which the reexamination is sought.[9] A leading case on the subject is *In re Pennsylvania Company*, 137 U. S. 451, which dealt with a petition for mandamus requiring the judges of a circuit court to reinstate, try and adjudicate a suit which they, in the circuit court, had remanded to the state court whence it had been removed. After referring to the earlier statutes and practice and coming to the Act of March 3, 1887, this Court said (p. 454):

"In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet

[7] The Act of March 3, 1887, was corrected in particulars not here material, and as corrected was reenacted by the Act of August 13, 1888, c. 866, 25 Stat. 433.

[8] This provision is still in force as part of § 71, Title 28, U. S. Code.

[9] The cases are collected and their effect is stated in Gay *v.* Ruff, 292 U. S. 25, 28-29. It was there also pointed out and definitely held that, under the general statute controlling review on certiorari by the Supreme Court, it is inadmissible for that court to review a decision of a circuit court of appeals directing a district court to remand a cause to a state court. p. 30. Therefore the general rule as stated above is limited to remanding orders made by the district (formerly circuit) courts.

the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error."

The provisions in the Act of 1887 on which that decision and others to the same effect were based are still in force as parts of §§ 71 and 80, Title 28, U. S. Code. They are in pari materia, are to be construed accordingly rather than as distinct enactments, and, when so construed, show, as was held in *Morey* v. *Lockhart,* 123 U. S. 56, 58, that they are intended to reach and include all cases removed from a state court into a federal court and remanded by the latter.

It follows that the remanding order of the district court was not subject to reexamination by the circuit court of appeals on the petition for mandamus.

2. It is conceded, and rightly so, that the district court was without personal jurisdiction of the defendant, and that in the absence of such jurisdiction the court was without power to proceed to an adjudication. The statute, § 80 *supra,* requires that a district court, when satisfied that a suit removed into it from a state court does not really and substantially involve a dispute or controversy "properly" within its jurisdiction, shall dismiss the suit or remand it to the state court, as justice may require. In this instance the dispute or controversy was not properly within the jurisdiction of the district court unless (1) the parties were citizens of different States; (2) the value or amount involved exceeded $3,000, exclusive of interest and costs; and (3) the defendant was before the court by reason of a general appearance or a valid service of process.[10] Each of these elements of jurisdiction was essential, and if any was wanting there was an absence of proper jurisdiction. The defendant was not before the court, and therefore it

[10] In Illinois Central R. R. Co. *v.* Adams, 180 U. S. 28, 34, and again in Venner *v.* Great Northern R. R. Co., 209 U. S. 24, 34, this Court defined the federal jurisdiction of the circuit court as follows:

"Jurisdiction is the right to put the wheels in motion and to proceed to the final determination of a cause upon the pleadings and evidence. It exists in the Circuit Courts of the United States under the express terms of the act of August 13, 1888, if the plaintiff be a citizen of one State, the defendant a citizen of another, if the amount in controversy exceed $2000 [afterwards changed to $3000] and the defendant be properly served with process within the district."

was without jurisdiction to proceed with the suit. Counsel for the petitioner assume that the presence of the defendant was not an element of the court's jurisdiction as a federal court; but the assumption is a mistaken one. By repeated decisions in this Court it has been adjudged that the presence of the defendant in a suit *in personam,* such as the one now under discussion, is an essential element of the jurisdiction of a district (formerly circuit) court as a federal court,[11] and that in the absence of this element the court is powerless to proceed to an adjudication.

In the circumstances already recited the district court was required to dismiss the suit for want of jurisdiction or to remand it to the state court from which it had been removed, and in selecting between these alternatives the court was required to act "as justice may require". The statute assumes that justice will be better served in some instances by a dismissal and in others by a remand. Making the required selection involves discretion—judicial discretion, not mere choice. Plainly the circumstances in which the court acted pointed to a remand as being, in justice, the more appropriate of the alternatives.[12]

It follows that, even if a remanding order were open to reexamination on a petition for mandamus, the petition was in this instance rightly denied.

*Judgment affirmed.*

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[11] Shepard *v.* Adams, 168 U. S. 618; Remington *v.* Central Pacific R. R. Co., 198 U. S. 95; Board of Trade *v.* Hammond Elevator Co., 198 U. S. 424; Kendall *v.* American Automatic Loom Co., 198 U. S. 477; Mechanical Appliance Co. *v.* Castleman, 215 U. S. 437; Merriam *v.* Saalfield, 241 U. S. 22; Stewart *v.* Ramsay, 242 U. S. 128.

[12] Pollard *v.* Dwight, 4 Cranch 421, 428-429; Texas Transportation Co. *v.* Seeligson 122 U. S. 519, 522; Cates *v.* Allen, 149 U. S. 451, 460-461; Pond *v.* Sibley, 7 Fed. 129, 138; Gombert *v.* Lyon, 80 Fed. 305; Peters *v.* Equitable Life Assurance Society, 149 Fed. 290, 294.